No. 73-858

Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1973

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant.

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and WOOD ACCEPTANCE CORP., individually and as representatives of all others similarly situated, and MICHAEL J. HOWLETT, Successor to JOHN W. LEWIS, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant.

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and WOOD ACCEPTANCE CORP., individually and as representatives of all others similarly situated, and MICHAEL J. HOWLETT, Successor to JOHN W. LEWIS, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

Appellant, Alfredo Gonzalez, individually and on behalf of all others similarly situated, appeals from the final judgment of a three-judge court in the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 16, 1973, dismissing the action for lack of standing. Appellant respectfully sub-

mits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Memorandum Decision and Judgment Order of the United States District Court for the Northern District of Illinois, Eastern Division, which is the subject of this appeal, is not yet officially reported. A complete copy of the Memorandum Decision and Judgment Order is attached to this Statement as Appendix A.

JURISDICTION

Appellant, Alfredo Gonzalez, brought this action under 28 U.S.C. §§1331, 1343(3) and (4) and 42 U.S.C. §1983 challenging the constitutionality of the automobile repossession and resale provisions of the Illinois Commercial Code, Ill. Rev. Stat. ch. 26, §§9-503 and 9-504, and those provisions of the Illinois Motor Vehicle Code, Ill. Rev. Stat. ch. 95-½, §§3-114(b), 3-116(b) and 3-612, permitting, authorizing and compelling the involuntary transfer of titles after a repossession and authorizing the issuance of special license plates to those in the business of repossessing automobiles. The plaintiff claims that the defendants violated the rights secured to him under the Due Process and Equal Protection clauses of the Fourteenth Amendment by seizing, taking possession of, selling and transferring title to his automobile, under color of law, without prior notice to the plaintiff, without an opportunity for plaintiff to be heard regarding his claim to possession and title of his automobile and without a judicial or third party determination of the validity or probable validity of the creditor's claim to possession.

Plaintiff sought declaratory and injunctive relief and monetary damages.

Because an injunction was sought to enjoin a state official, the Secretary of State, from enforcing or executing state statutes a three-judge district court was convened pursuant to 28 U.S.C. §§2281 and 2284.

On August 16, 1973 the three-judge court entered a final judgment dismissing the action. Plaintiff Gonzalez filed his Notice of Appeal from this judgment, a copy of which is attached hereto as Appendix B, in the district court on October 4, 1973. Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U.S.C. §1253. The following decisions sustain the jurisdiction of this Court to review this judgment on a direct appeal from a three-judge district court:

> *Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947 (1968);
> *Lynch* v. *Household Finance Corp.*, 404 U.S. 538, 31 L.Ed.2d 424 (1972).

QUESTIONS PRESENTED

1. Mr. Gonzalez' automobile was repossessed by his creditor, after a unilateral determination of default, without notice and without a judicial or other hearing to determine the validity or probable validity of the creditors' claim to possession. The district court determined, from the facts alleged in the complaint, that if Gonzalez would have had a hearing on the question of default he would have prevailed. The district court thereupon dismissed the complaint on the grounds of lack of standing. The question presented is whether Gonzalez lacks standing to contest the constitutionality of statutes that allow the

taking of his property without prior notice and hearing on the ground that had he been given such a hearing he would have prevailed?

2. Whether plaintiff's claims for injunctive relief and monetary damages are moot because his automobile had already been repossessed and sold?

STATUTES INVOLVED

Because this action was dismissed on procedural grounds, lack of standing, the statutes challenged in the original lawsuit are not involved in this appeal. However, said statutes were appended to the district court's opinion and are found in Appendix A at pages 7a-11a.

STATEMENT OF THE CASE

Gonzalez brought Count I of this action against his creditor, Mercantile National Bank of Chicago, as a plaintiffs and defendants class action seeking to enjoin enforcement of the automobile repossession and resale provisions of the Illinois Commercial Code. Count II sought to enjoin the Secretary of State from enforcing state statutes compelling the transfer of titles after a repossession and resale. Count IV sought monetary damages for injuries sustained as a result of defendant Mercantile National Bank's deprivation, under color of law, of rights secured to him under the Constitution of the United States.[1]

[1] Counts I and II also contained three other individual plaintiffs, Hermogenes Mojica, James Barnett and Compton C. Banks, who have not appealed the dismissal of the action. The other private party defendants, Automatic Employees Credit Union, Car Credit Corp., Overland Bond & Investment Corp. and Wood Acceptance Corp., were the creditors of these plaintiffs. Counts III, V and VI were individual damage actions against these creditors.

Gonzalez purchased an automobile under a retail installment sales contract that gave the holder of the contract all "the rights and remedies provided by Article 9 of the Illinois Uniform Commercial Code" which includes the right to repossess without notice or hearing upon the unilateral determination of default by the creditor. Mercantile repossessed the automobile, sold it and applied for and received a transfer of title from the Secretary of State on the basis of a repossession. Gonzalez then brought this action alleging a deprivation of his constitutional rights to due process and equal protection by this procedure.

In the complaint, Gonzalez alleged facts that, taken at face value, lead to the conclusion that he was not in default at the time of repossession and that Mercantile was not entitled to possession of the automobile. Those portions of the amended complaint that pertain to plaintiff Gonzalez are set forth in Appendix C. Mercantile filed an answer contesting some of the factual allegations pleaded by Gonzalez and also moved to dismiss. A copy of Mercantile's answer is attached hereto as Appendix D. The Secretary of State filed documents showing that Mercantile had applied for and received title to the automobile on the basis of a repossession. These documents are attached hereto as Appendix E.

The district court dismissed the action on the grounds that the plaintiff lacked standing to contest the lack of a due process hearing prior to the seizing of his property because the pleaded facts showed that had he been given such a hearing he would have prevailed and, secondarily, that the action was moot because plaintiff's automobile had already been sold and title transferred.

THE QUESTIONS ARE SUBSTANTIAL

We submit that the decision of the three-judge district court dismissing this action should be either summarily reversed or set for plenary consideration with briefs and oral argument because the decision (1) is directly contrary to prior Supreme Court decisions, (2) is in conflict with decisions of other districts and circuits and (3) has misconceived the issues so as to deprive the plaintiff of his day in court on the merits.

I. The Plaintiff Has Standing To Bring This Action

Plaintiff Gonzalez challenged the constitutionality of those sections of the Illinois Commercial Code that allow creditors to seize possession of automobiles without a determination of their right to possession. The key issue and fact is the actual repossession; the taking prior to notice and a hearing. Of this fact there can be no question. The title was transferred by the Secretary of State on the basis that the automobile was repossessed. See Appendix E. The defendant has not denied or challenged in any way that the automobile was repossessed without notice or without an opportunity to be heard.

The district court, taking the allegations of the complaint at face value, determined that Gonzalez was not in default at the time his automobile was repossessed and that therefore defendant Merchantile was guilty of a conversion of plaintiff's property. The court below thereupon held that Gonzalez lacked standing to challenge the constitutionality of the repossession laws because if he was not actually in default the taking was a conversion and not a lawful repossession. It is here that the court below misconceived the issues and decided the case in conflict with applicable decisions of this Court.

The unconstitutionality and unlawfulness of the defendant's actions, and its liability therefore, attaches as of the moment of the repossession without notice and hearing. No subsequent determination of the validity or invalidity of the repossession affects or changes the unconstitutionality and unlawfulness of the original act and the defendant's liability.

In *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972) the plaintiffs sued for declaratory and injunctive relief against the continued enforcement of the Florida and Pennsylvania pre-judgment replevin acts. In holding the acts unconstitutional, this Court noted there was a dispute between Mrs. Fuentes and her creditor. However, this Court never determined whether or not Mrs. Fuentes was in default or the creditor's ultimate right to possession of the goods. This Court dealt only with the fact that the original taking was without notice and hearing.

In its opinion this Court explicitly held that the purpose of due process is to protect against unfair mistaken and unlawful conversions of property, stating:

> "Its purpose, [the right to a hearing] more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . .
>
> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be

prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . ." (407 U.S. at 81)

"[T]he essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property . . . ." (407 U.S. at 97)

In *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969), Mr. Justice Harlan, in a concurring opinion, explained that the purpose of a hearing prior to deprivation of property is:

"aimed at establishing the validity or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use." (395 U.S. at 343)

The district court based its dismissal of the action for lack of standing on the ground that:

"If plaintiffs' allegations in the amended complaint are accurate, actions may sound for conversion or for recovery under the generous damage provisions of Ill. Rev. Stat. ch. 26, §9-507-(1). Even their punitive damages may be sustainable. But, under their present status, they do not possess standing to assert these constitutional claims." (App. A, p. 4a)

The theory that a possible suit for conversion deprives a plaintiff of standing to contest his right to a hearing in the first place was rejected by his Court in *Fuentes* as follows:

"If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may

even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'" (407 U.S. at 81-82)

To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific good, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced." (407 U.S. at 83)

Although the complaint set forth the facts surrounding the repossession, plaintiff never explicitly alleged that he was not in default. We recognize that the facts lead inescapeably to that conclusion, but it was the court below that reached the conclusion. Plaintiff included the facts of the repossession in the complaint because constitutional questions should be decided in the context of a concrete factual situation; not as an abstract legal exercise. Thus, this Court in the *Fuentes* opinion set forth the facts leading up to the takings in detail although this Court did not determine the question of default.

The district court's opinion and judgment is also in conflict with the repossession decisions of other districts and circuits. There have been numerous lawsuits filed across the country contesting the constitutionality of the repossession provisions of the Uniform Commercial Code.

All of the other districts and circuits have reached the merits of the case; which has always turned on the question of "state action." We recognize that the majority of decisions have held that there is no state action involved in a repossession and have dismissed for failure to state a federal cause of action.[2] However, none of the prior cases have been dismissed on procedural grounds.

Thus, in *Adams* v. *Southern California First National Bank*, ... F.2d ..... (9th Cir. 10-4-73) one of the debtors, Hampton, alleged facts that showed he was not in default at the time of repossession.[3]

The district court had dismissed on the grounds that the court lacked subject-matter jurisdiction. The Ninth Circuit, in a decision on the merits, held that the repossession was not performed under color of law. It therefore affirmed the dismissal but noted "that the proper ground for dismissing in *Hampton* was failure to state a federal cause of action, rather than that the federal court lacked subject-matter jurisdiction." (Opinion, p. 21)

[2] Significantly, however, the most recent repossession decision, *Gibbs* v. *Titelman*, ... F.Supp. ..... (E.D.Pa. 11-8-73) reviewed all the prior decisions, found that the repossessions were performed under color of law and held the Pennsylvania repossession statutes unconstitutional.

[3] The facts as stated by the Ninth Circuit are:

> Plaintiff-appellant Hampton purchased a 1967 Buick on September 3, 1969. The purchase was financed by means of a contract of sale which was assigned to The Bank of California (Bank), and which called for 30 monthly payments of $118.30, or a total of $3,549. After nearly two years of making payments, Hampton was allegedly late in making his August, 1971 payment. Hampton claims that the Bank agreed that he could make up the missed payment at a later date, so long as he kept current on the rest of his payments, and in accordance with this agreement, Hampton tendered the next month's payment. This payment was returned to him, and sometime during the night of October 4, 1971, the Bank repossessed the car. (Opinion, pp. 4-5)

The holding of the district court creates an irreconcilable conflict with the decisions of other districts in civil rights cases involving consumers. In *Klim* v. *Jones*, 315 F.Supp. 109 (N.D.Cal. 1970), *Santiago* v. *McElroy*, 319 F.Supp. 284 (E.D.Pa. 1970) (3 judge ct.), and *Laprease* v. *Raymours Furniture Co.*, 315 F.Supp. 716 (N.D.N.Y. 1970) (3 judge ct.), it was held that the prehearing taking of property was done under color of law even though the plaintiffs pleaded that they were not in default prior to the seizures.

Actually, the district court's ruling amounts to stating that a person who pays his bills has no right to a hearing before his property is taken away from him. In *Fuentes* and *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 (1915) this Court held that even a person who is in default has the right to a hearing before losing possession:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." (407 U.S. at 87; 237 U.S. at 424)

To hold that a person who is not in default has less rights than a person in default is absurd.

We submit that the court below decided the one issue which is irrelevant to this case; whether Gonzalez was in default. It failed to decide the valid issues which were

presented. The plaintiff has standing to present the issues concerning the repossession and transfer of title of automobiles and this cause should be remanded for a decision on the merits.

Finally, even if Gonzalez was not in default at the time of repossession he still has standing to challenge the constitutionality of the statutes. The district court properly noted that "In Illinois, there is only one road to repossession and that road winds its way through §§9-503 and 9-504." (App. A, p. 4a) There is no dispute that the automobile was repossessed.

The argument that violations of state law performed pursuant to state authority are not done pursuant to state law was firmly rejected in *Monroe* v. *Pape,* 365 U.S. 167 (1961). The issue there was whether police officers acting in violation of Illinois law acted "under color of state law." This Court ruled that a misuse of a power possessed by virtue of state law constituted an action done "under color of law." The district court also argued that the state remedy of conversion precluded federal jurisdiction here because of lack of standing. But the fact that there was a state remedy for the wrongful search and seizure in *Monroe* v. *Pape* did not preclude those actions being held to be "under color of law."

II. The Case Is Not Moot.

The district court held that Gonzalez could not seek injunctive relief against the practice of repossessing and transferring title on automobiles because his car had already been repossessed, sold and its title transferred. The district court characterized such relief as "useless" and considered the question presented as "hypothetical."

Again the opinion of the district court is in direct conflict with the decision of this Court in *Fuentes.* The plaintiffs in *Fuentes* were in exactly the same procedural posture as Gonzalez here. All of the plaintiffs in *Fuentes* had previously had their property taken from them without notice or a hearing and had therefore already been injured by the challenged statutes. None of the plaintiffs in *Fuentes* made any attempt to regain their property, which ultimately passed completely from their control. Instead, they "sought declaratory and injunctive relief against the *continued* enforcement of the procedural provisions of the state statutes that authorized pre-judgment replevin." (407 U.S. at 71) Under these circumstances, this Court granted relief in *Fuentes.* On the basis of that decision, Gonzalez is entitled to his day in court and a decision on the merits.

Furthermore, the decision of the district court is also in conflict with the decisions of other districts and circuits. Several other cases dealing with the civil rights of consumers against *ex parte* taking of their property have granted declaratory and injunctive relief and representative status to persons who had already been deprived of their property. *Klim* v. *Jones,* 315 F.Supp. 109 (N.D.Cal. 1970); *Santiago* v. *McElroy,* 319 F.Supp. 284 (E.D.Pa. 1970) (3 judge ct.); *Musselman* v. *Spies,* 343 F.Supp. 528 (M.D.Pa. 1972) (3 judge ct.); *Hall* v. *Garson,* 430 F.2d 430 (5th Cir. 1970) and *Hammond* v. *Powell,* 462 F.2d 1053 (4th Cir. 1972).

The district court's opinion completely ignores the principle set forth in the above cases that one who has been injured by an unconstitutional action may sue to prevent its future occurrence. If allowed to stand, the district court's ruling would preclude the best parties

from seeking declaratory and injunctive relief; those actually harmed by the unconstitutional activity.

In this case the plaintiff challenged the constitutionality of state statutes allowing repossessions without notice or a hearing. There is no question that such repossessions are still continuing by almost all Illinois creditors, including Mercantile National Bank. In treating the case as moot, the district court has declared that if a creditor has been able to completely consummate what may be an unconstitutional act it may continue to engage in such practices without judicial review. This theory is in direct conflict with prior decisions of this Court which have held that if the questioned activities are capable of repetition the case is not moot because the named plaintiff cannot obtain complete relief or restitution. *Moore* v. *Ogilvie,* 394 U.S. 815 (1969); *United States* v. *Concentrated Phosphate Export Assn.,* 393 U.S. 199, 203, 21 L.Ed.2d 344 (1968); *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632, 97 L.Ed 1303 (1953).

In *Concentrated Phosphate,* this Court held that a case became moot only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Here the allegedly wrongful conduct is certain to recur and, in fact, creditors are still repossessing cars.

Moore v. *Ogilvie* held that federal courts do have jurisdiction to decide questions that are ones "capable of repetition, yet evading review." In *Moore,* independent candidates for President and Vice-President in 1968 sued to enjoin the presidential nominating procedures of Illinois. The Court noted that although the 1968 election was over and the plaintiffs could not obtain relief for themselves, Illinois still retained the same nominating system. The

Court held that there was a present judiciable controversy and held the Illinois nomination system unconstitutional. The dissent points out that there was no allegation that the candidates themselves planned to run again.

Finally, even assuming arguendo that the claim for injunctive relief is moot, the district court clearly erred in also dismissing plaintiff's claim for monetary damages. In Count IV of the amended complaint Gonzalez pleaded and prayed for monetary damages resulting from violations of his constitutional rights under color of law. This claim was also dismissed.

There is no question that such a claim of damages vests jurisdiction even if claims for injunctive relief are mooted. It was so held in *Powell* v. *McCormack,* 395 U.S. 486 (1969) and *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957). In *Powell,* this Court held that Congressman Powell's claim for past salary rendered the case not moot even though his claim to be seated in Congress was mooted by his election and seating in the then current Congressional session. *Textile Workers* concerned a suit to compel arbitration and for damages under §301(a) of the National Labor Relations Act of 1947. Although the employer had terminated its operations after the appellate decision, this Court held that the case was not moot: ". . . to the extent they sought a monetary award, the case is a continuing controversy." (353 U.S. at 459)

CONCLUSION

For the foregoing reasons and pursuant to the above cited authority, the plaintiff-appellant submits that the Memorandum Opinion and Judgment Order of the three-judge district court is in direct conflict with applicable decisions of this Court and decisions of other districts and circuits in similar cases. We submit that the questions presented by this Appeal are substantial and of broad public importance. Plaintiff-appellant therefore respectfully requests this Court to take jurisdiction of this Appeal and reverse the decision of the court below.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

Hermogenes Mojica, Alberto Gonzalez, James Barnett and Compton C. Banks, individually and on behalf of all others similarly situated,
Plaintiffs,
vs.
Automatic Employees Credit Union, Mercantile National Bank Of Chicago, Car Credit Corp., Overland Bond & Investment Corp. and Wood Acceptance Corp., individually and as representatives of all others similarly situated, and John W. Lewis, Secretary of State,
Defendants.
NO. 72 C 686

MEMORANDUM OPINION AND JUDGMENT ORDER

This action seeks a declaratory judgment that the automobile repossession and resale provisions of the Illinois Commercial Code are unconstitutional and further requests a permanent injunction against their enforcement. Plaintiffs contend that the statutes in question violate their rights, under the fourth, fifth, and fourteenth amendments, to notice, an opportunity to be heard, and an impartial determination of right to title before repossession of an automobile. Since a permanent injunction of state statutes is sought, a three-judge district court was convened pursuant to 28 U.S.C. §§2281 and 2284 (1970).

Plaintiffs' amended complaint contains six counts. Count I, pleaded as a plaintiffs[1] and a defendants[2] class action, asserts the invalidity of Ill. Rev. Stat., ch. 26, §§ 9-503 and 9-504.[3] Count II alleges a plaintiffs class action[4] and challenges the constitutionality of Ill. Rev. Stat., ch. 95½, §§ 3-114(b), 3-116(b), and 3-612.[5] Counts III, IV, and V demand compensatory and punitive damages to Plaintiffs Mojica, Gonzalez, and Barnett respectively. The final count alleges, on behalf of Mojica individually, violations by Defendant Credit Union of the federal Truth in Lending Act, 15 U.S.C. 1601 *et seq.* (1968). Counts III and VI, both relating to Plaintiff Mojica, were dismissed with prejudice by stipulation of parties.

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[1] The Count I plaintiffs class is defined as
". . . all persons who are debtors under security agreements involving motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed for an alleged default, without prior notice or an opportunity to be heard."
Amended Complaint, Count I, ¶ 3.

[2] Amended Complaint, Count I, ¶ 4 defines the defendants class as
". . . all persons who are secured parties within the meaning of Ill. Rev. Stats. ch. 26, § 9-105(1) and who may, upon their unilateral determination of default by debtor-obligees, seek to recover possession and dispose of the collateral governed by such security agreements pursuant to and under color of Illinois Revised Statutes ch. 26, § 9-503 and 4."

[3] See Appendix.

[4] The Count II, ¶ 4 class of plaintiffs includes
". . . all persons who are debtors under security agreements invoking [sic] motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed and sold for an alleged default without prior notice and an opportunity to be heard and whose certificate of title has been or will be terminated and transferred by the Secretary of State."

[5] See Appendix.

An examination of the pleadings and other relevant papers submitted by the four representative plaintiffs reveals that three of them—Mojica, Gonzalez, and Barnett—allege almost identical factual situations. In each case, the debtor-plaintiff granted the creditor-defendant a purchase money security interest in a used automobile. In each case, the defendant summarily repossessed the car, applied for and received repossession title, and resold it to a third party not involved in this litigation. And, in each case, plaintiff alleges that he was not in default at the time his automobile was repossessed.

Banks, the fourth representative plaintiff, also granted a defendant a purchase money security interest in his car. However, no repossession occurred and Banks' sole claim in this action is his anticipated "fear" that his automobile will be repossessed in violation of the Illinois Commercial Code. In fact, when this suit was instituted, Banks was immediately released by his creditor from all obligations under his security agreement and note of indebtedness.

Upon consideration of the posture of this case and the contentions of the various parties, we conclude that the amended complaint must be dismissed because the plaintiffs—individually as well as representatively—lack standing to maintain this action.

I.

The Commercial Code expressly conditions a creditor's right to repossession upon the existence of an actual, bona fide default. Ill. Rev. Stat., ch. 26, §§ 1-203, 9-501(1), 9-503, 9-504. Moreover, use of Ill. Rev. Stat., ch. 95½, §§ 3-114(b), 3-116(b) and 3-612 is contingent upon a lawful and proper transfer of interest in the automobile. Taking their complaint at face value, the transaction of which each plaintiff complains involved a violation (or, as to Banks, a feared violation) of the statutes plaintiff challenges. Indeed, each plaintiff whose car was repossessed charges that his creditor-defendant acted with malice and seeks punitive damages.

Thus, in a case where they assert that the repossession and resale provisions of the Illinois Code were used *improperly* and *maliciously* against them, plaintiffs ask this Court to determine the validity of these statutes when *properly* applied to debtors *actually in default*. We must decline. Such a context is hardly appropriate for the resolution of the constitutional issues plaintiff presents. The courts that have reached these constitutional arguments have done so only after careful consideration of their jurisdictional basis. See *Adams* v. *Egley*, 338 F.Supp. 614 (S.D.Cal. 1972), *Oller* v. *Bank of America*, 342 F.Supp. 21 (W.D.Cal. 1972), *McCormick* v. *First National Bank of Miami*, 322 F.Supp. 604 (S.D.Fla. 1971).

We recognize full well that our insistence upon proper parties and proper procedure avoids what might otherwise be a meritorious claim. But we also recognize the danger of deciding such questions on inappropriate records. The impropriety of hypothetical determinations concerning the proper application of a statute wrongly applied in the given case have led the courts to uniformly decline to make decisions such as plaintiff seeks. *Oil Workers Unions* v. *Missouri*, 361 U.S. 363 (1960); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *DeKorwin* v. *First National Bank*, 275 F.2d 755 (7th Cir. 1960).

In Illinois, there is only one road to repossession and that road winds its way through §§ 9-503 and 9-504. Any taking that does not comply with these sections is unlawful and subjects the taker to criminal and civil liability. If plaintiffs' allegations in the amended complaint are accurate, actions may sound for conversion or for recovery under the generous damage provisions of Ill. Rev. Stat., ch. 26, § 9-507 (1). Even their punitive damages may be sustainable. But, under their present status, they do not possess standing to assert these constitutional claims. See *Dash* v. *Mitchell*, 356 F. Supp. 1292 (D.D.C. 1972).

II.

A further bar to plaintiffs' constitutional claims must be noted. Counts I and II of the amended complaint seek the extraordinary remedies of declaratory and injunctive relief. Each of the named plaintiffs, however, lacks standing to seek such relief. Indeed, even if this Court granted plaintiffs the remedies they seek in these Counts, not one of them would benefit thereby.

It is highly questionable whether Plaintiff Banks ever had standing to maintain this action:

> "The mere intention to take some action at some time in the future, which might or might not occur, and which if it does occur might present a situation coming under the Civil Rights Act does not present any justiciable question under the Civil Rights Act . . ."

Progress Dev. Corp. v. *Mitchell*, 182 F. Supp. 681, 713, (W.D. Ill. 1960), rev'd in part on other grounds, 286 F.2d 222 (7th Cir. 1961). Moreover, when Banks was released by his defendant from all obligations, he received all the relief to which he was entitled. Accordingly, he no longer has standing under the principles of *Watkins* v. *Chicago Housing Authority*, 406 F.2d 1234 (7th Cir. 1969) and *Dale* v. *Hahn*, 440 F.2d 633 (2d Cir. 1971). See also *Crimmins* v. *American Stock Exchange*, 346 F Supp. 1256 (S.D.N.Y. 1972).

The automobiles of Plaintiffs Barnett and Gonzalez were repossessed and resold, with titles transferred, before either party joined this action. It is well established that "if the act to be enjoined has already been committed, equity will not interfere, since the granting of an injunction under such circumstances would be a useless act." 1 High on Injunctions § 23 (4th ed. 1905) (citing cases). Granting declaratory and injunctive relief to these plaintiffs, then, would be a "useless act." *See Todd* v. *Joint Apprenticeship Committee*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965), *McKee & Co.* v.

First National Bank, 397 F.2d 248 (9th Cir. 1968), and *Manion* v. *Holtzman*, 379 F.2d 843 (7th Cir.), *cert. denied*, 389 U.S. 976 (1967). Each of these cases held that injunctive relief would not issue where the act sought to be enjoined was completed after the suit was filed. It follows that standing to seek such relief must be lacking where the challenged event was completed before the claim was instituted.

Similar considerations apply to Plaintiff Mojica, the only representative whose car was resold, with title transferred after the filing of this suit. Since his automobile was resold during this litigation, both declaratory and injunctive relief would be "useless acts". *See Todd, McKee,* and *Manion, supra.*

III.

One of the primary requirements of a class action is that the party maintaining the suit must be a member of the class he seeks to represent. Fed. R. Civ. P. 23(a); 7 C. Wright & A. Miller, Federal Practice and Procedure, § 1761; *Bailey* v. *Patterson*, 369 U.S. 31 (1962). Since plaintiffs here lack standing themselves, they certainly cannot represent others. This conclusion results from a fair reading of Fed. R. Civ. P. 23(a) which requires such litigants to be actual representatives of their class. Indeed, Rule 23(a)(4) states that representatives must "fairly and adequately protect the interests of the class." It can hardly be said that these plaintiffs—unable to obtain standing for themselves—will provide adequate representation for those alleged to be similarly situated. *Kaufman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (2d Cir. 1970, *cert. denied*, 401 U.S. 974 (1971); *Fitzgerald* v. *Kriss*, 10 F.R.D. 51 (N.D.N.Y. 1950); *Watkins* v. *Chicago Housing Authority*, 406 F.2d 1234 (7th Cir. 1969). Accordingly, plaintiffs fail to meet the essential tests of Rule 23(a) and class action standing.

IV.

Since we conclude that all plaintiffs in this case fail to present a claim which can be reached on the merits, the amended complaint is dismissed.

/s/ Luther Swygert
Chief Judge, United States Court of Appeals
/s/ Richard B. Austin
Judge, United States District Court
/s/ Frank J. McGarr
Judge, United States District Court

DATED: August 16, 1973

APPENDIX

Ill. Rev. Stat., ch. 26, § 9-503. Secured Party's Right to Take Possession After Default.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504. Ill. Rev. Stat., ch. 26, § 9-504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject

to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must reasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this State or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

Ill. Rev. Stat., ch. 95½, § 3-114(b)

If the interest of the owner is terminated or the vehicle is sold under a security agreement by a lienholder named in the certificate of title, the transferee shall promptly mail or deliver within fifteen (15) days to the Secretary of State the last certificate of title, his application for a new certificate in the form the Secretary of State prescribes, and an affidavit made by or on behalf of the lienholder that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to the terms of the security agreement. If the lienholder succeeds to the interest of the owner and holds the vehicle for resale, he must secure a new certificate of title and upon transfer to another person, shall deliver to the transferee the properly assigned certificate.

Ill. Rev. Stat., ch. 95½, § 3-116(b)

The Secretary of State, upon receipt of an application for a new certificate of title by a transferee other than by voluntary transfer, with proof of the transfer, the required fee and any other documents required by law, shall issue a new certificate of title in the name of the transferee as owner. If the outstanding certificate of title is not delivered to him, the Secretary of State shall make demand therefor from the holder thereof.

Ill. Rev. Stat., ch. 95½, § 3-612. Repossessor plates.

The Secretary, upon receipt of an application, made on the form prescribed by the Secretary of State may issue to financial institutions, to lending institutions and to persons engaged in the business of repossessing motor vehicles for others in situations where the motor vehicle is the security for the funds, special plates which may be used by such financial institutions, lending institutions and repossessors solely for the purpose of operating the motor vehicles which are repossessed by such repossessors upon a default in the contract.

Said special plates shall, in addition to the legends provided in Section 3-412 of this Act, contain a phrase "repossessor" and such other letters or numbers as the Secretary of State may prescribe. If an applicant for such plates is engaged in repossessing vehicles for other persons and does not hold a certificate, registration or permit from the Illinois Commerce Commission to conduct such an operation, the application shall be denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

Hermogenes Mojica, Alberto Gonzalez, James Barnett and Compton C. Banks, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

Automatic Employees Credit Union, Mercantile National Bank Of Chicago, Car Credit Corp., Overland Bond & Investment Corp. and Wood Acceptance Corp., individually and as representatives of all others similarly situated, and John W. Lewis, Secretary of State.
Defendants.

No. 72 C 686

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(Rec'd October 4, 1973)

Notice is hereby given that Alberto Gonzalez, individually and on behalf of all others similarly situated, a plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on August 16, 1973.

This appeal is taken pursuant to 28 U.S.C. §1253 and §2101(b).

/s/ James O. Latturner
Counsel for Plaintiff

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Chicago, Illinois 60640

Allen R. Kamp
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PROOF OF SERVICE

I, James O. Latturner, one of the attorneys for Alberto Gonzalez, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of October, 1973, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on all parties required to be served by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, a list of which is attached hereto.

/s/ James O. Latturner
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APPENDIX C

IN THE UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

Hermogenes Mojica, Alberto Gonzalez, James Barnett and Compton C. Banks, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

Automatic Employees Credit Union, Mercantile National Bank Of Chicago, Car Credit Corp., Overland Bond & Investment Corp. and Wood Acceptance Corp., individually and as representatives of all others similarly situated, and John W. Lewis, Secretary of State,
Defendants.

NO. 72 C 686

AMENDED COMPLAINT

Now come the plaintiffs, Hermogenes Mojica and Alberto Gonzalez, by their attorneys, James O. Latturner and Allen R. Kamp, and the plaintiffs, James Barnett and Compton C. Banks, by their attorney, William J. McNally, and complain against the defendants as follows:

COUNT I

1. Plaintiffs seek to have this Court declare that Illinois Revised Statutes, Ch. 26 §§9-503 and 9-504 are invalid and unconstitutional insofar as these sections permit and authorize the repossession and subsequent sale of a debtor's property upon the alleged default of a security agreement without any prior notice or

opportunity to be heard and to temporarily, preliminarily and permanently enjoin the defendants and the defendant class from repossessing or selling articles pursuant to the authority of these sections on the grounds that these procedures deprive such alleged debtors of the due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments and constitute an unreasonable seizure prohibited by the Fourth Amendment to the Constitution of the United States.

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1343(3) and (4) and Title 42 U.S.C. Sec. 1983. This cause of action is also properly within the ancillary jurisdiction of this Court.

3. The plaintiffs bring this class action on their own behalf, and on behalf of all other persons similarly situated pursuant to Rules 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure. The class is composed of all persons who are debtors under security agreements involving motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed for an alleged default, without prior notice or an opportunity to be heard. This class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; and the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

4. Defendants Automatic Employees Credit Union, Mercantile National Bank of Chicago, Wood Acceptance Company and Overland Bond & Investment Corp. are sued individually and as representatives of all other similarly situated, pursuant to Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure. The class is composed of all persons who are secured parties within the meaning of Ill. Rev. Stats. ch. 26, §9-105(i) and who may, upon their unilateral determination of default by debtor-obligees, seek to recover possession and dispose of the collateral governed by such security agreements pursuant to and under color of Illinois Revised Statutes ch. 26, §9-503 and 4. Said class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class; the defenses of the representative parties are typical of the defenses of the class, and the representatives parties will fairly and adequately protect the interests of the class. Further, the prosecution of separate actions against the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class.

ALLEGATIONS PERTAINING TO PLAINTIFF GONZALEZ

13. Plaintiff, Alfredo Gonzalez, is a citizen of the United States and a resident of Chicago, Illinois.

14. Defendant, Mercantile National Bank of Chicago, is engaged ir the business of making loans and consumer financing under secured transactions with its principal place of business in Chicago, Illinois.

15. On January 22, 1972, Gonzalez purchased a used 1968 Pontiac from Chicago, Illinois Motor Sales, Inc. pursuant to a retail installment contract. A copy of the retail installment contract and the bill of sale are attached hereto as Exhibits "C" and "D" respectively.

16. The retail installment contract was made on a form supplied and prepared by Mercantile. Chicago, Illinois Motor Sales, Inc. had authority to extend credit to Gonzalez on behalf of Mercantile and assigned the contract to Mercantile on or shortly after January 22, 1972.

17. The amount financed pursuant to the retail installment contract also included physical damage and collision insurance, which was required by the contract as a condition of financing. Said insurance was purchased by Mercantile and was for the benefit of the holder of the contract, Mercantile.

18. The contract provided for Gonzalez to pay fifteen installments of One Hunderd Twenty Dollars and Seventy-Eight Cents ($120.78) each beginning on February 28, 1972 and on the same day of each successive month until paid.

19. Gonzalez paid the February 28, 1972 installment.

20. On March 26, 1972 and April 16, 1972, Gonzalez was involved in accidents covered by the insurance required by the contract. The amount of the claim payable to Mercantile as a result of these accidents was Three Hundred Twenty-Two Dollars and Sixty-Eight Cents ($322.68).

21. On April 18, 1972 the insurance referred to in Paragraph 17 above was cancelled by the insurance company. Pursuant to this cancellation Mercantile received a Two Hundred Twenty-Nine Dollars and Ninety-Four Cents ($229.94) rebate. Said rebate was paid directly to Mercantile by the insurance company.

22. On or about April 25, 1972 said automobile was repossessed by Mercantile pursuant to and under color of Illinois Revised Statutes, Ch. 26, Sec. 9-503, without the knowledge or consent of Gonzalez.

23. At the time of repossession, Mercantile had received an amount in excess of the payments then due and owing on the contract.

ALLEGATIONS PERTAINING TO ALL PLAINTIFFS

49. Illinois Revised Statutes, Ch. 26, §9-503, pursuant to which plaintiffs' automobiles have been or may be repossessed, provides in part:

> "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

50. Subsequent to repossession, plaintiffs' automobiles have been or may be sold pursuant to Ill. Rev. Stats. Ch. 26 §9-504, which provides in part as follows:

> "(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . ."
>
> (4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this party or of any judicial proceedings.
>
> (a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or
>
> (b) in any other case, if the purchaser acts in good faith. . ."

51. At all times relevant herein the defendants were acting under color of the laws of the State of Illinois and injuring plaintiffs and depriving plaintiffs of the rights, privileges and immunities secured to the plaintiffs

by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

52. Ill. Rev. Stats. Ch. 26 Sec. 9-503 and 9-504 are contrary to and violate the Constitution of the United States in that:

> (a) said statutes establish and authorize a procedure which permits the taking of property without prior notice and an opportunity to be heard in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States;
>
> (b) the effect of said statutes is that secured creditors need not resort to the State Court system to compel performance, but may instead resort to a concept of self-help. Debtors under the same contracts on the other hand, are required to resort to the judicial process to compel performance of the same contract or recover damages for breach thereof. Thus, these statutes deny debtors the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States; and
>
> (c) the actions of the defendants constitute an unreasonable seizure of plaintiff's property as prohibited by the Fourth Amendment of the Constitution of the United States.

53. Plaintiffs have no adequate remedy at law and unless relief is granted, plaintiffs will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action as to both the plaintiff class and defendant class.

2. Declare that Ill. Rev. Stats. Ch. 26 Sec. 9-503 and 9-504 are invalid and unconstitutional on their face and as applied for the reasons that they violate the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

3. Enter temporary, preliminary and permanent injunctions enjoining the defendants, and each person in the class of defendants here represented, and their agents, employees and assignees, and all other persons in active concert and participation with them from repossessing or or selling articles pursuant to the authority of these sections on the grounds that these procedures deprive the plaintiffs of the rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Grant plaintiffs their costs in this action and such other and further relief as the Court shall deem just.

COUNT II

1. Plaintiffs individually and on behalf of all others similarly situated seek to have this Court declare invalid and enjoin the enforcement of Ill. Rev. Stat. Ch 95½, Sec. 3-114(b), 3-116(b) and 3-612 insofar as these statutes of state wide application permit, authorize and compel the Secretary of State to transfer title and issue a new certificate of title to a transferee after an involuntary repossession and to issue special repossessor plates to those in the business of repossessing automobiles. Said statutes deprive debtors allegedly in default of the due process and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Jurisdiction is based upon Title 28, U.S.C. Sec. 1331, 1343(3) and (4). Jurisdiction is further conferred on this Court by Title 28, U.S.C. Sec. 2201, 2202, 2281, 2284 and 42 U.S.C. Sec. 1983.

3. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. Sec. 2281 and 2284

since plaintiffs seek an injunction to restrain defendant, Secretary of State, from the enforcement, operation and execution of statutes of statewide applicability, on the ground that said statutes are contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. The plaintiffs bring this class action on their own behalf, and on behalf of all other persons similarly situated pursuant to Rules 23 (b)(l)(A) and 23 (b)(2) of the Federal Rules of Civil Procedure. The class is composed of all persons who are debtors under security agreements invoking motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed and sold for an alleged default without prior notice and an opportunity to be heard and whose certificate of title has been or will be terminated and transferred by the Secretary of State. This class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. In addition, the defendant Secretary and his agents have acted and refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole; and the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

5. Defendant John W. Lewis, is the duly appointed Secretary of State and is charged with state-wide administration of the Illinois Vehicle Code, specifically including transfer of title and registration of motor vehicles.

6.-54. Plaintiff incorporates and realleges paragraphs 5 through 53 of Count I as paragraphs 6 through 54 of this Count II.

55. Ill. Rev. Stats. Ch. 95½ Sec. 3-114(b) and 3-116(b) authorize and compel the defendant Secretary to transfer title and issue a new certificate to a transferee after an involuntary repossession. Said statutes provide:

3-114 Transfer by operation of law:

(b) If the interest of the owner is terminated or the vehicle is sold under a security agreement by a lienholder named in the certificate of title, the transferee shall promptly mail or deliver within fifteen (15) days to the Secretary of State the last certificate of title, his application for a new certificate in the form the Secretary of State prescribes, and an affidavit made by or on behalf of the lienholder that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to the terms of the security agreement. If the lienholder succeeds to the interest of the owner and holds the vehicle for resale, he must secure a new certificate of title and upon transfer to another person, shall deliver to the transferee the properly assigned certificate.

3-116 When Secretary of State to issue a new certificate

(b) The Secretary of State, upon receipt of an application for a new certificate of title by a transferee other than by voluntary transfer, with proof of the transfer, the required fee and any other documents required by law, shall issue a new certificate of title in the name of the transferee as owner. If the outstanding certificate of title is not delivered to him, Secretary of State shall make demand therefor from the holder thereof.

56. Ill. Rev. Stats., Ch. 95½ Sec. 3-612 authorizes the defendant Secretary to issue special repossessor plates to those in the business of repossessing automobiles under the Illinois Commercial Code. Said Statute provides:

3-612 Repossessor Plates

The Secretary, upon receipt of an application, made on the form prescribed by the Secretary of State may

issue to financial institutions, to lending institutions and to persons engaged in the business of repossessing motor vehicles for others in situations where the motor vehicle is the security for the funds, special plates which may be used by such financial institutions, lending institutions and repossessors solely for the purpose of operating the motor vehicles which are repossessed by such repossessors upon a default in the contract. . .

57. Ill. Rev. Stats. Ch. 95½ Sec. 3-114(b), 3-116(b) and 3-612 and defendant Secretary's enforcement of them are contrary to and violate the Constitution of the United States in that:

(a) said statutes establish and authorize a procedure which permits the taking of property without prior notice and an opportunity to be heard in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

(b) the effect of said statutes is that accured creditors need not resort to the State Court system to compel performance, but may instead resort to a concept of self-help. Debtors under the same contracts on the other hand, are required to resort to the judicial process to compel performance of the same contract or recover damages for breach thereof. Thus these statutes deny debtor's the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Wherefore, plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Convene a three-judge District Court pursuant to 28 U.S.C. Sec. 2281 and 2284 to hear and determine this controversy.

2. Determine by order, pursuant to Rule 23(c) (1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Declare that Ill. Rev. Stats. Ch. 26, Sec. 9-503 and 9-504 and Ch. 95½ Sec. 3-114(b), 3-116(b) and 3-612 are invalid and unconstitutional on their face and as applied for the reasons that they violate the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

4. Enter preliminary and permanent injunctions, enjoining defendant, Secretary, his successors in office, agents and employees, and all other persons in active concert and participation with him from transfering title and issuing a new certificate of title to a transferee after an involuntary repossession and from issuing special repossession plates to those in the business of repossessessing motor vehicles pursuant to the authority of these statutes on the grounds that said procedures deprive the plaintiff of the rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

5. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiffs their costs herein, and also grant them and all persons similarly situated such additional or alternative relief as may seem to this Court to be just, proper and equitable.

COUNT IV

1. Plaintiff Gonzalez seeks in this Count to recover damages for injuries sustained and to redress the deprivation, under color of State law, of rights secured to him by the Constitution of the United States.

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1331 and 1343(3) and (4) and Title 42 U.S.C. Sec. 1983. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000.00). This cause of action is also properly within the ancillary jurisdiction of this Court.

3-17. Plaintiff incorporates by reference and realleges paragraphs 13-23 and 49-52 of Count I as paragraphs 3-17 of this Count.

18. As a direct and proximate result of defendant Mercantile repossessing plaintiff's personal property in the wrongful manner described above, plaintiff has been damaged by defendant Mercantile in the sum of Fifteen Hundred Dollars ($1,500.00) which is the fair market replacement value of said property.

19. In addition, plaintiff has lost the use of his automobile and as a direct result thereof has suffered great mental and emotional anguish and has suffered the loss of the use of his property and has been deprived of the rights secured to him under the Constitution of the United States by the defendant Mercantile, who acted with knowledge of the wrongfulness of its acts and with malice.

Wherefore, plaintiff Gonzalez respectfully prays:

1. For judgment in his favor and against the defendant Mercantile Union in the sum of Twelve Thousand Dollars ($12,000.00) actual damages and Fifty Thousand Dollars ($50,000.00) punitive damages;

2. Grant plaintiff his costs in this action and such other and further relief as the Court shall deem just.

APPENDIX D

ANSWER OF DEFENDANT MERCANTILE NATIONAL BANK OF CHICAGO TO AMENDED COMPLAINT

Mercantile National Bank of Chicago ("Mercantile"), defendant herein, by its attorneys, Paul E. Flaherty, Donald J. Parker, Albert E. Jenner, Jr., William B. Davenport and Peter A. Flynn, answers the amended complaint as to plaintiff Alfredo Gonzalez as follows:

COUNT I

1. Mercantile admits that plaintiff Gonzalez seeks to have this Court declare Sections 9-503 and 9-504 of the Uniform Commercial Code, Ill. Rev. Stats. ch. 26 §§9-503 and 9-504 unconstitutional. Mercantile denies that said statutes, or either of them, are unconstitutional on any of the grounds asserted by plaintiff Gonzalez. Mercantile asserts that even if said statutes, or either of them, is unconstitutional, plaintiff Gonzalez has no standing to seek injunctive relief of any kind by reason of matters hereinafter stated.

2. Mercantile admits that plaintiff Gonzalez purports to invoke the jurisdiction of this Court under Title 28 U.S.C. Section 1343(3) and (4), and Title 42 U.S.C. Section 1983. Mercantile denies that plaintiff's purported cause of action is also properly within the ancillary jurisdiction of this Court.

3. Mercantile admits that plaintiff Gonzalez purports to bring this class action on his own behalf and on behalf of all other persons similarly situated under the stated portion of Rule 23 of the Federal Rules of Civil Procedure. Mercantile denies each and every other allegation of paragraph 3.

4. Mercantile admits that plaintiff Gonzalez purports to sue Mercantile individually and as a representative of all others similarly situated pursuant to the stated portion of Rule 23 of the Federal Rules of Civil Procedure. Mercantile denies each and every other allegation of paragraph 4.

5-12. Mercantile makes no answer to these paragraphs, since these paragraphs do not refer to Mercantile.

13. Mercantile is without information concerning the citizenship and residence of plaintiff Gonzalez and accordingly denies the allegations of paragraph 13.

14. Mercantile admits that it is engaged in the business, among other things, of making loans and financing consumer transactions, with its principal place of business in Chicago, Illinois.

15. Mercantile admits the allegations of paragraph 15.

16. Mercantile admits the allegation of the first sentence of paragraph 16 that the retail installment contract was made on a form supplied by Mercantile but denies the allegation thereof that the retail installment contract was prepared by Mercantile. Mercantile denies the allegation of the second sentence of paragraph 16 that Chicago, Illinois Motor Sales, Inc. had authority to extend credit to plaintiff Gonzalez on behalf of Mercantile but admits the allegation thereof that Chicago, Illinois Motor Sales, Inc. assigned the contract to Mercantile shortly after January 22, 1972.

17. Mercantile admits the allegations of the first sentence of paragraph 17. Mercantile admits the allegation of the second sentence of paragraph 17 that said insurance was purchased by Mercantile but avers that said insurance was for the benefit of both plaintiff Gonzalez and Mercantile, as the holder of the contract, as their interests might appear.

18. Mercantile admits the allegations of paragraph 18.

19. Mercantile admits that plaintiff Gonzalez paid all but 78 cents of the installment due February 28, 1972, but avers that said payment was not made until March 6, 1972.

20. Mercantile admits the allegations of paragraph 20.

21. Mercantile admits the allegations of paragraph 21.

22. Mercantile denies each and every allegation of paragraph 22. Mercantile avers that on or about May 24, 1972, it learned that the automobile purchased by Gonzalez, as alleged in paragraph 15 of the amended complaint, was then at City Wide Auto Repairs ("City Wide"), 3221 North Pulaski, Chicago, and was advised that it had been at City Wide since on or about April 17, 1972. Mercantile further avers that it obtained possession of said automobile from City Wide on June 7, 1972, upon its payment to City Wide for repairs to said automobile in the amount of $542.68. Mercantile further avers that it was advised by plaintiff Gonzalez on May 30, 1972, that he could not pay the then overdue installments on said automobile ($362.34 for the months of March, April and May), and the excess of the repair costs over the proceeds of the insurance required by the contract (said excess being $220.00). Mercantile further avers that in any event, under the retail installment contract, a copy of which is attached to the amended complaint as Exhibit C, any unearned insurance premium received by the holder shall be credited to the final maturing installments of the contract, with exceptions not here pertinent.

23. Mercantile denies each and every allegation of paragraph 23. For further answer to paragraph 23, Mercantile incorporates herein by reference its answer to paragraph 22 above.

24-48. Mercantile makes no answer to these paragraphs, since these paragraphs do not refer to Mercantile.

49. Mercantile admits that Section 9-503 of the Uniform Commercial Code, Ill. Rev. Stats. ch. 26, Section 9-503, provides in part as alleged in said paragraph. Mercantile alleges that said automobile of plaintiff Gonzalez was repossessed pursuant to the retail investment contract, a copy of which is attached to the amended complaint as Exhibit C.

50. Mercantile admits that Section 9-504 of the Uniform Commercial Code, Ill. Rev. Stats. ch. 26, Section 9-504, provides in part as alleged in said paragraph. Mercantile avers that on June 7, 1972, it sent to plaintiff Gonzalez and to the co-signer of the above-mentioned retail installment contract, by certified mail, return receipt requested, a notice of sale to be held on June 19, 1972. Said notice of sale was in compliance with said Section 9-504. Mercantile further avers that on June 19, 1972, it sold said automobile to Chicago, Illinois Motor Sales, Inc. for the amount owing to Mercantile by Gonzalez on said retail installment contract.

51. Mercantile denies each and every allegation of paragraph 51. Mercantile avers that its actions in repossessing and selling said automobile were taken pursuant to and in accordance with its contract with plaintiff Gonzalez.

52. Mercantile denies each and every allegation of paragraph 52.

53. Mercantile denies each and every allegation of paragraph 53.

FIRST AFFIRMATIVE DEFENSE TO COUNT I

Plaintiff Gonzalez lacks standing to seek injunctive relief under Count I of the Amended Complaint because plaintiff's automobile was sold by Mercantile, pursuant to the retail installment contract with plaintiff, of which a copy is attached to the Amended Complaint as Exhibit C, prior to the filing of the Amended Complaint.

SECOND AFFIRMATIVE DEFENSE TO COUNT I

Count I of the Amended Complaint fails to state a claim on which relief can be granted.

Wherefore, Mercantile demands that Count I of the Amended Complaint be dismissed as to it, and that it have judgment for its costs of this action.

COUNT II

1-57. Mercantile makes nc answer to the allegations of Count II, since Count II requests no relief against Mercantile other than declaratory relief also sought in Count I. As to the request for such declaratory relief, Mercantile realleges its answer to Count I.

COUNT IV

1. Mercantile admits that Count IV purports to seek recovery for damages allegedly sustained by plaintiff Gonzalez and to redress the alleged deprivation, allegedly under color of state law, of rights allegedly secured to him by the United States Constitution. Mercantile denies that plaintiff Gonzzalez is entitled to any recovery under Count IV, for the reasons hereinafter set forth.

2. Mercantile admits that plaintiff Gonzalez purports to invoke the jurisdiction of this Court under Title 28 U.S.C. Section 1343(3) and (4), and Title 42 U.S.C. Section 1983. Mercantile denies that the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000). Mercantile denies that plaintiff's purported cause of action is also properly within the ancillary jurisdiction of this Court.

3-17. Mercantile incorporates by reference and realleges its answer to paragraphs 13-23 and 49-52 of Count I.

18. Mercantile denies each and every allegation of paragraph 18.

19. Mercantile admits that plaintiff Gonzalez no longer has the use of the automobile described in paragraph 15 of Count I of the Amended Complaint. Mercantile denies each and every other allegation of paragraph 19 of Count IV.

Wherefore, Mercantile demands that Count IV of the Amended Complaint be dismissed and that it have judgment for its costs of this action.

APPENDIX B

Certificate Number 80601

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

I, JOHN W. LEWIS, Secretary of State of the State of Illinois do hereby certify that the following and hereto attached is a true photostatic copy of Application for Illinois title in the name of Alfredo Gonzalez, 822 W. Cuyler, Chicago, Illinois covering 1968 Pontiac, s/n 223678U141450 showing lien to Mercantile National Bank, 550 W. Jackson Blvd., Chicago, Illinois in the amount of $1811.70, dated February 22, 1972, which title EJ0490138 was issued March 24, 1972. Application for repossession title in the name of Mercantile National Bank of Chicago, 222 South Riverside Plaza, Chicago, Illinois covering 1968 Pontiac, s/n 223678U141450, which title EJ1229227 was issued June 16, 1972

the original of which is now on file and a matter of record in this office

In Testimony Whereof, I hereunto set my hand and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield this 11th day of December AD 1972

John W. Lewis
SECRETARY OF STATE

EXHIBIT "B"

USE BLACK BALLPOINT PEN OR TYPEWRITER WITH DARK RIBBON

TITLE NO. ▷ J0490138

VEHICLE IDENTIFICATION NO. 223678U141450

FEB-23-72 7211 0 T R-- 381 2.00

Make	Year Model	Body Style	No. Cyl.	Horsepower	CCM. Piston Displacement
PONTIAC	68	FIRA 2100	8	48.0	

PRINT FULL NAME: Last GONZALEZ First ALFREDO Middle — Date of Purchase Mo. 2 Day 22 Yr. 72 — Purchased NEW USED

Legal Address 822 W CUYLER — State of Last Registration ILLINOIS

City or Town CHICAGO ILL. Zip Code — County COOK

WRITTEN SIGNATURE OF OWNER (S) X Alfred Gonzalez — Social Security Number 508-76-7328

Lien in favor of: MERCANTILE NATIONAL BANK — Date Mo. 2 Day 22 Yr. 72

Street Address 550 W JACKSON BLVD — Amount $1811.70

City CHICAGO State ILL Zip Code 60606

APPLICANT MUST SIGN FULL NAME
FOLLOW THE INSTRUCTIONS ON THE REVERSE SIDE

I (We) acquired the above-described NEW ☐ USED ☐ on Month Day Year 72

From ILLINOIS MOTOR SALES, INC

Street 5[illegible] WESTERN AVE. City CHICAGO, ILLINOIS State

Whose address is Street 539-2660 City State

THIS VEHICLE OPERATED FOR HIRE ☐ NOT FOR HIRE ☒

1. Have you operated this vehicle in Illinois? NO
2. Are you a licensed dealer? — Dealer's License No. —
3. ☐ I am applying for title Only ☐ I am applying for title and registration or transfer

SIGNATURE OF SELLING DEALER: CHICAGO ILLINOIS [illegible] YES INC.

Selling Dealer's License No. 1520 State ILL Year 1972

Subscribed and sworn to before me this [illegible] day of [illegible] 19 72

SEAL NORTH [illegible] (Notary Public)

(Notary's Address)

SURRENDERED Title Number H 225130 State ILL

76257343

APPLICATION FOR CERTIFICATE OF TITLE

CERTIFICATE OF TITLE WITH REGISTRATION OR TRANSFER ... $2.00
CERTIFICATE OF TITLE ONLY ... $3.00

JOHN W. LEWIS, Secretary of State

TD-3.12 14

USE BLACK BALLPOINT PEN OR TYPEWRITER WITH DARK RIBBON

TITLE NO. J1229227

VEHICLE IDENTIFICATION NO. 223678U141450

JN 16-72 5921 201 — 500

Make	Year Model	Body Style	No. Cyl.	Horsepower	CCM. Piston Displacement
Pontiac	1968	Firebird	8	48.0	

PRINT FULL NAME (Last, First, Middle): Mercantile National Bank of Chgo

Date of Purchase: Mo. 6 Day 7 Yr. 72 — Purchased: NEW [ ] USED [X]

Legal Address: 222 South Riverside Plaza

State of Last Registration: Illinois

City or Town: Chicago ILL Zip Code: 60606

County: Cook

WRITTEN SIGNATURE OF OWNER (S): Michael W. Nelsen Mercantile National Bank of Chgo c/o

Social Security Number:

Lien in favor of: none

JUN 16 1972

APPLICANT MUST SIGN FULL NAME
FOLLOW THE INSTRUCTIONS ON THE REVERSE SIDE

I (We) acquired the above NEW [ ] USED [X] on Month June Day 7 Year 1972

From Alfredo Gonzalez

Whose address is Street 822 W. Cuyler City Chgo. State Ill.

THIS VEHICLE OPERATED FOR HIRE [ ] NOT FOR HIRE [X]

1. Have you operated this vehicle in Illinois? no
2. Are you a licensed dealer? no Dealer's License No. none
3. [ ] I am applying for title Only. [ ] I am applying for title and registration or transfer of registration.

SIGNATURE OF SELLING DEALER none

RECEIVED JUN 16 1972 JUN 1 TITL

Selling Dealer's License No. _____ State _____ Year _____

Subscribed and sworn to before me this 14 day of June 19 72

SEAL SPECIAL (Notary Public)

JUN 16 19 (Notary's Address)

SURRENDERED Title Number JO490138 State Illinois

TITLES

APPLICATION FOR CERTIFICATE OF TITLE

FEES: CERTIFICATE OF TITLE WITH REGISTRATION OR TRANSFER $7.50
CERTIFICATE OF TITLE ONLY $5.00

JOHN W. LEWIS, Secretary of State

TD-3-12 ASSOCIATION SERVICES